SUPREME COURT U.S.
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No. 02-625

In the

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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35 pp

QUESTIONS PRESENTED

Where a plaintiff makes a claim alleging ongoing discriminatory conduct in violation of Title III of the Americans with Disabilities Act:

1. Whether the defendant may moot the cause of action by showing that the past instances of defendant's discriminatory conduct (that were identified in the complaint) have been corrected, but without showing that further instances of defendant's conduct will not occur in the future?

2. Whether an affidavit submitted in opposition to a defendant's motion for summary judgment may be disregarded, at the trial court's discretion, because the affidavit describes additional instances of the conduct that was the subject of the complaint, but which specific instances had not occurred until after the date of the complaint and were not described in the complaint?

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INTRODUCTION

The Brief in Opposition ("Oppo.")filed by Fremont Street Experience Limited Liability Company ("FSELLC") does not even attempt to address the questions presented for review. Indeed, the only argument made by FSELLC in direct opposition to the propriety of granting the writ of certiorari is that a mere attempt to "'correct' the lower courts in their resolution of this litigation . . . is not a proper reason for seeking certiorari." Oppo. at 22. In presenting this argument, FSELLC erroneously states that the "Petition [does not] seek the interpretation of a federal statute or rule." Oppo. at 22. As is clear from the Petition, however, both a federal statute and a federal rule are at issue.

The federal statute at issue is 42 U.S.C. § 12182(b)(2)(A)(ii) which expressly defines a form of "discrimination," for the purposes of 42 U.S.C. § 12182(a), to include discriminatory "policies, practices, or procedures." The first question presented in the Petition concerns whether this proscription of discriminatory *conduct* is subject to being mooted (under a standard that is the polar opposite of the standard set forth in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) and in *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199 (1968)) by the artifice of literally "disintegrating" the violative *conduct* into discrete *instances* of discrimination.

The federal rule at issue is Rule 56(c) of the Federal Rules of Civil Procedure which provides, with regard to the proceedings on a motion for summary judgment, that "[t]he adverse party prior to the day of the hearing may serve opposing affidavits." The Ninth Circuit imposed a novel limitation on the scope of the admissibility of affidavits

opposing summary judgment (again, by the artifice of literally "disintegrating" the violative *conduct* into discrete *instances* of discrimination). The second question presented in the Petition clearly concerns the Ninth Circuit's departure from the plain terms of Rule 56(c) of the Federal Rules of Civil Procedure.

I. Most of FSELLC's Arguments are Ill-Suited to Addressing the Petition.

The Brief in Opposition is more of a plaudit of the District Court's decision than it is a defense of the Ninth Circuit's decision. Apart from its conclusory (and plainly mistaken) contention that the Petition does not seek the interpretation of a federal statute or rule, the Brief in Opposition does not present any argument contesting the Petition's submission that the *questions presented* are important and merit this Court's consideration. Instead, FSELLC has submitted to this Court a "warmed-over" version of the "Appellee's Brief" filed with the Ninth Circuit on January 16, 2002. FSELLC's effort to re-use its earlier pleading provides the Court with arguments that are largely a non-sequitur to the Petition.

For example, the questions presented to this Court for a writ of certiorari (and, indeed the questions presented to the Ninth Circuit for review) do not concern any ADA violation other than FSELLC's "pattern, practice, or procedure" of permitting inaccessible temporary and mobile facilities onto the Fremont Street Experience. Thus, no purpose is served by FSELLC's extensive discussion (*see*, Oppo. at 4-9, and 11-15) of various physical structures (that have been made accessible through this litigation) and of Petitioner's lack of standing to bring suit to correct

inaccessible employee work areas. Similarly, the District Court's procedural decisions (*e.g.*, requiring Disabled Rights to file a "Statement of Claims" and awarding summary judgment to FSELLC despite its failure to file a "statement of undisputed facts," *see* App. at 9a) were not disturbed by the Ninth Circuit (and no party before the Ninth Circuit challenged those decisions).

II. FSELLC's Discriminatory Policy, Practice, or Procedure Was Properly Before the District Court.

FSELLC fervently attempts to assume the role of an ingenue in professing that it "was never quite able to understand what the DRAC meant when it alleged that 'mobile retail sales facilities' were inaccessible." Oppo. at 16. The act is not convincing.

The Second Amended Complaint noted inaccessible conditions at both the Race Rock mobile store (at Paragraph 10(b)) and at a temporary food kiosk.[1] Certainly, any "befuddlement" on the part of FSELLC regarding the claim that was presented to the Ninth Circuit for review (a claim concerning discriminatory *conduct)* could not have lingered after the filing of the "Statement of Claims[2]" which clearly

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[1] Paragraph 10(c) of the Second Amended Complaint stated that "DRAC's members desire the opportunity to shop at the food kiosk (and any other temporary kiosk operated at the Fremont Street Experience) without being subjected to the affront and indignity of enduring discrimination."

[2] The District Court did not consider the "Statement of Claims" to be sufficiently "specific." *See* App. at 12a. Apparently, the District Court was interested in knowing what specific *facilities* would be in violation at the time that the motion for summary judgment was filed. Where temporary and mobile facilities are at issue (and absent

stated that an ongoing violation was "[i]naccessible mobile retail sales facilities in violation of ADAAG 7.2(1) entering the property from time to time."

III. An Injunction May Be Granted to Stop FSELLC's Discriminatory Policy, Practice, or Procedure.

FSELLC essentially argues that 42 U.S.C. § 12182(b)(2)(A)(ii) is unenforceable because the ADA's provision for injunctive relief does not permit a court to order "broad remedies" and that an effort to enjoin a discriminatory policy, practice or procedure constitutes "unreasonableness" that is contrary to the underlying purposes of the ADA. Oppo. at 17-19. In this regard, it must again be noted that the Ninth Circuit did not chose to address FSELLC's argument that injunctive relief under the ADA is limited in the manner that FSELLC suggests. Next, it should be noted that this Court has upheld an injunction of a policy found to be in violation of 42 U.S.C. § 12182(b)(2)(A)(ii). *See, PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). Finally, FSELLC's citation to (the former) President Bush's praise of the "careful balance struck between the rights of individuals with disabilities and the legitimate interests of business" should not be construed to suggest that the disabled are not entitled to the access that is expressly prescribed by Title III of the ADA and its implementing regulations, nor that ongoing discriminatory

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precognition), such "specificity" is, of course, impossible to provide. Furthermore, the "Statement of Claims" should not provide a district court with a method of bypassing "Rule 8(a)'s simplified notice pleading standard." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002) (noting that "Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required,' and [that] Rule 8(f) provides that '[a]ll pleadings shall be so construed as to do substantial justice.'")

conduct constitutes a "legitimate interest" of business.

FSELLC argues that Disabled Rights lacks even standing to obtain injunctive relief in this case. Oppo. at 20-22. This argument (again, one which was presented to the Ninth Circuit which did not rule on the argument – even though a ruling favorable to FSELLC would have obviated any need for the Ninth Circuit to address evidentiary matters) has three prongs.

First, FSELLC cites to the truism that injunctive relief is only issued with regard to future harm. What FSELLC ignores – in this matter which concerns *the lower courts' ignoring evidence* – is the fact that mootness is at issue, not standing, so the burden of proof should (under every known case other than the case presented for review) be on the *defendant* to demonstrate mootness.

FSELLC's second argument is that, because no members of the Disabled Rights Action Committee were "denied services or accommodations," Disabled Rights never had standing in the first place. That argument[3] was accepted by the District Court, but the Ninth Circuit simply did not accept FSELLC's invitation to nullify the word "readily" as it is used in 42 U.S.C. § 12183(a)(1) (requiring new facilities to be "readily accessible and usable by individuals with disabilities.") *See also, Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001).

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[3] Which argument relies upon *Midgett v. Tri-County Metropolitan Transp. Dist.*, 74 F.Supp. 2d 1008 (D. Ore. 1999), a case that does not even address Title III of the ADA, but is limited to Title II of the ADA.

Finally, FSELLC argues that its compliance with *other* requirements of Title III of the ADA was a proper alternative basis for awarding it summary judgment vis-a-vis its ongoing discriminatory conduct that is at issue in the Petition. Oppo. at 21-22. Although the Ninth Circuit did allude to FSELLC's remedying "many of the conditions complained of," it would be a broad leap to conclude that the Ninth Circuit affirmed the District Court on such basis. Indeed, the presiding judge of the panel whose decision is presented for review was the Honorable Michael Daly Hawkins, who was the author of *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001). In that case, the Ninth Circuit considered a decision of the U.S. District Court for Nevada where the district court had found a violation of Title III of the ADA, but nonetheless declined to order injunctive relief because:

> [w]hile this may be a technical violation of the language of the Guidelines, the Court finds there has been substantial compliance with the spirit of the law. Considering the enormous expense required to modify the structure, and the near absence of hardship and that constituting a minimal inconvenience to wheelchair users, this Court is loathe [sic] to grant injunctive relief to Plaintiffs on this issue.

Long v. Coast Resorts, Inc., 32 F.Supp.2d 1203, 1212 (D.Nev. 1999).

The Ninth Circuit reversed the district court's "determination that, because the Orleans demonstrated obedience to the spirit of the ADA, plaintiffs were not entitled to injunctive relief." *Long v. Coast Resorts, Inc.*, 267

F.3d 918, 923 (9th Cir. 2001). FSELLC is familiar with the Ninth Circuit's decision in *Long v. Coast Resorts, Inc.*,[4] but still contends that a business is entitled to pick and choose what parts of the ADA it will obey. Thus, even though (since 1995) the disabled community has complained about FSELLC's discriminatory practice of permitting inaccessible *temporary and mobile* retail sales facilities onto the Fremont Street Experience, FSELLC steadfastly refuses to require conformance with appropriate legislative regulations because FSELLC has remedied some of the structural violations associated with *permanent* structures at the Fremont Street Experience.

IV. FSELLC Confuses "Discovery" With Affidavits in Opposition to Summary Judgment.

FSELLC's concept of "discovery" is completely at odds with "discovery" as described in the Federal Rules of Civil Procedure. In short, "discovery" (as set forth in the rules) includes (in addition to required disclosures) "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon the land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission." Fed. R. Civ. Proc. 26(a)(5). A party's own affidavit is simply not "discovery." If it were, then the provision in Rule 56(c) of the Federal Rules of Civil Procedure which affords the opportunity for affidavits in opposition to summary judgment would be rendered a

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[4] FSELLC cites to *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001) three times (for a point of law that is irrelevant to the questions presented). *See* Oppo. at 14, 15, 29.

nullity in cases where the motion for summary judgment is filed after the close of discovery. Because motions for summary judgment are frequently filed after the close of discovery, the rationale presented by FSELLC (again, one which was presented to the Ninth Circuit, but which was not addressed by the Ninth Circuit) would radically change practice and procedure relating to motions for summary judgment.

V. FSELLC's Discriminatory Policy, Practice, or Procedure Is Ongoing.

The Brief in Opposition repeatedly contends that FSELLC's discriminatory conduct[5] is in the past. Ironically, on December 13, 2002, a new case was filed in the U.S. District Court for the District of Nevada. *See* App. D at 31a. That case, *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.*, CV-S-02-1642-LRH-PAL (a copy of which was sent via facsimile to FSELLC's counsel on December 12, 2002[6]), notes that the discriminatory conduct of FSELLC is ongoing as of December 5, 2002, and seeks an injunction to stop FSELLC from "permitting persons to locate inaccessible temporary or mobile retail sales facilities onto the Fremont Street Experience."

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[5] FSELLC has also contended that the evidence excluded from consideration is insufficient to demonstrate an ADA violation. Oppo. at 28. Sufficiency of the evidence, is, of course, a matter to be determined at trial and not in a motion for summary judgment.

[6] Because of the timing at issue and the realities of preparing booklet form pleadings, Petitioner does not accuse FSELLC of making a misrepresentation at page 27 of the Brief in Opposition (where FSELLC refers to the absence of a new "separate action against the FSELLC").

On the one hand, the filing of *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.*, might lead the Court to conclude that, because the questions presented in the Petition will certainly be faced by the lower courts in the near future, it need not grant certiorari. Petitioner, however, urges the Court to consider the "sunk costs to the judicial system" in this matter. *See, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191-192 (2000). Specifically, this "case has been brought and litigated . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal." *Id.*

If *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.*, follows the pattern of the case below, the plaintiffs there will not be able to maintain their claim regarding FSELLC's discriminatory conduct because the lower courts will again deem FSELLC's conduct to consist of discrete instances of discrimination that can be mooted. Thus, three years hence, the plaintiffs in *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.* will be seeking a writ of certiorari from this Court regarding the same questions presented in the Petition.

CONCLUSION

FSELLC does not argue that courts may properly "disintegrate" claims of discriminatory *conduct* into discrete (and mootable) *instances* of discrimination, as it is clear enough that claims alleging a course of discriminatory conduct "are different in kind from discrete acts. Their very nature involves repeated conduct. . . . Such claims are based on the cumulative affect of individual acts." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, ___, 122 S.Ct. 2061, 2073 (2002) (citations omitted). It is, however,

clear that the Ninth Circuit's decision in the case submitted for review is fundamentally in conflict with this Court's recent distinction between discriminatory conduct and discrete acts of discrimination, and that (consistent with the principles enunciated in *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)) a GVR order should be entered which would give the Ninth Circuit an opportunity to consider *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, ___, 122 S.Ct. 2061, 2073 (2002) in the context of the litigation.

Respectfully submitted.

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APPENDIX D

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed December 13, 2002]

TAMARA THOMPSON; and DISABLED RIGHTS ACTION COMMITTEE, a Utah non-profit corporation, Plaintiffs,	)	
vs.	)	NO. CV-02-1642 LRH(PAL)
THE FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, a Nevada limited liability company, Defendant.	)	**COMPLAINT**

COME NOW Plaintiffs, TAMARA THOMPSON;

and DISABLED RIGHTS ACTION COMMITTEE, ("Disabled Rights"), by and through their attorney, the law firm of Armknecht & Cowdell, P.C., and for their claims for relief against Defendant, THE FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, a Nevada limited liability company ("FSELLC"), allege as follows:

1. This is an action for injunctive relief to remedy Defendant's "administrative methods"; "pattern or practice"; and/or "policies, practices or procedures" which have the effect of subjecting disabled persons (Tamara Thompson, individually, and Disabled Rights' other wheelchair-user members) to unlawful discrimination in places of public accommodation. Plaintiffs complain of Defendant's ongoing conduct of permitting discrimination in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et. seq., (the "ADA"). The discrimination at issue is architectural barriers which prevent "ready access" to wheelchair users.

2. Public accommodations and commercial facilities built for first occupancy after January 26, 1993, are required to be "readily accessible to and useable by individuals with disabilities." 42 U.S.C. §12183(a)(1). The Department of Justice, in accordance with 42 U.S.C. §12186(b), has provided, in its implementing regulations for Title III of the ADA, the "Standards for Accessible Design." See, 28 C.F.R. Part 36. Those standards are set forth in Appendix A of 28 C.F.R. Part 36, and are known as the "ADA Accessibility Guidelines"' which are referred to herein as the "ADAAG." Despite the clear mandate of the ADA, the clear standards of the ADAAG, entreaties from the disabled as early as 1995, and a previous lawsuit (wherein the United States District

Court for the District of Nevada declined to address the claims made herein by deeming the claims -- which were presented as evidence -- to constitute "new issues"), Defendant steadfastly maintains its permissive conduct vis-a-vis the facilities allowed onto the Fremont Street Experience.

JURISDICTION AND VENUE

3. Plaintiff TAMARA THOMPSON files this action individually, and Plaintiff DISABLED RIGHTS ACTION COMMITTEE files this action on behalf of its members who are wheelchair users (which include Tamara Thompson). The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343(a)(4), and 42 U.S.C. § 12188(a)(1).

4. Venue of this action is appropriate in the United States District Court for the District of Nevada, Southern Division, pursuant to 28 U.S.C. § 1391(b) and (c) as the claim arose in such district and, further, as Defendant conducts business in such district.

THE PARTIES

5. Plaintiff TAMARA THOMPSON is a natural person who resides in southern Nevada. She requires a wheelchair for mobility. TAMARA THOMPSON has standing to bring this action under 42 U.S.C. § 12188(a)(1) because she was subjected to discrimination by Defendant and because she will continue to be subject to discrimination until Defendant ends its discriminatory conduct.

6. Plaintiff DISABLED RIGHTS ACTION COMMITTEE ("Disabled Rights") is a Utah non-profit corporation organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings,

transportation, goods and services. The Americans with Disabilities Act (ADA) constitutes such a law. Disabled Rights is qualified as a charitable organization under 26 U.S.C. § 501(c)(3). Members of Disabled Rights are primarily individuals with disabilities and persons related to individuals with disabilities. Disabled Rights is headquartered in Salt Lake City, Utah, and has over 1,000 members nationwide. As a result of their disabilities, certain features of accessibility are necessary to allow Disabled Rights' members access to public buildings, transportation, goods and services, which access is required under Title III of the ADA. Most of Disabled Rights' Nevada members reside in Clark County, Nevada, and they must base their decisions regarding what public accommodations they should patronize on the accessibility of the public accommodations. Accordingly, Disabled Rights' disabled members cannot fully and evenly participate in the amenities of living in Las Vegas unless Defendant complies with the requirements of Title III of the ADA. Disabled Rights has standing as the representative of its members.

7. Defendant FSELLC is a Nevada limited liability company doing business in Clark County, Nevada. FSELLC is subject to the requirements of the ADA because it operates and/or is the lessor of public accommodations, as defined in Title III of the ADA, 42 U.S.C. § 12181. The Fremont Street Experience was constructed subsequent to January 26, 1993, and accessibility features of such accommodation must accordingly meet the high standard imposed by the ADA upon "new construction." FSELLC has authority to prohibit persons from locating inaccessible temporary or mobile retail sales facilities onto the Fremont Street Experience.

FACTUAL BACKGROUND

8. On November 30, 1995, Mr. Ronald Ray Smith (a wheelchair user residing in Las Vegas, Nevada) wrote a letter to Mr. Donald D. Snyder, an officer of FSELLC. In the letter, Mr. Smith informed Mr. Snyder that Mr. Frank Stephens (a wheelchair user) had visited The Fremont Street Experience where he had encountered temporary facilities which did not afford wheelchair users with "ready access." Mr. Smith's letter concluded with a request for a modification of FSELLC's policies practices, or procedures: "If your staff has not thought to provide the ready access to your temporary facilities, please issue the necessary orders to provide it, for this occasion and all future occasions."

9. Despite Mr. Smith's request, FSELLC's policies, practices, and procedures continued to permit inaccessible temporary and mobile facilities (as well as inaccessible permanent facilities) to locate onto The Fremont Street Experience. On October 26, 1998, Mr. Smith and the Disabled Rights Action Committee filed a complaint against Defendant in the U.S. District Court for the District of Nevada alleging, inter alia, violations of Title III of the Americans with Disabilities Act (codified at 42 U.S.C. § 12181, et seq.) and praying for, inter alia, "an injunction enjoining Defendant Fremont Street Experience Limited Liability Company from continuing discrimination." After significant motions practice had been conducted, FSELLC filed its "Motion for Summary Judgment"on April 13, 2001.

10. On May 1, 2001, the plaintiffs in the earlier case filed (as an exhibit to "Plaintiffs' Opposition to FSELLC's Motion for Summary Judgment") the "Third Affidavit of Ronald Ray Smith," which demonstrated that, as of April 21, 2001, FSELLC continued to permit

retail sales facilities having inaccessible customer service counters (specifically, a mobile grill and two mobile bars) to locate onto The Fremont Street Experience.

11. On July 23, 2001, this Court's "Memorandum Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motions for Summary Judgment" was entered, wherein this Court stated that:

> Plaintiffs now try to assert new claims by way of an affidavit of Plaintiff Smith filed on May 1, 2001, stating newly observed problems at the Fremont Street Experience. This affidavit raises completely new issues. The court is satisfied that it is not going to order prospective injunctive relief based on these newly raised issues. Even as to these newly observed problems, there has been no showing of injury in fact. If Plaintiffs feel that they can establish that they have suffered an injury in fact by way of the newly raised problems, and are unable to get relief from FSELLC or whoever is responsible, these new issues could form the basis of a new case seeking preliminary injunctive relief.

The Court's previous judgment thus makes it clear that res judicata does not preclude the claims presented herein as, "[i]n order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 2002) (citing Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 323-24 (1971)). Because the Court clearly stated that the claims are "completely new issues" (and accordingly did not reach the merits), res judicata cannot apply.

12. On the evening of December 5, 2002, Tamara Thompson and another member of Disabled Rights (which member uses a motorized scooter) attended a "ho down" at the Fremont Street Experience which was being held for one night only – in celebration of the start of the 2002 National Finals Rodeo. While at the ho down, Tamara Thompson and the other member of Disabled Rights patronized two temporary bars which had been set up for business at the Fremont Street Experience. On information and belief, the temporary bars are the same facilities that were encountered by Mr. Ronald Ray Smith on April 21, 2001. The temporary bars did not afford ready access to wheelchair users. Specifically, the bars did not provide any portion of counter space that was not higher than 36 inches. Furthermore, the temporary bars did not provide a level ground surface upon which a wheelchair user could transact the purchase of a beverage. While Tamara Thompson and the other member of Disabled Rights did successfully purchase beverages, the lack of ready access caused them to sustain substantial affront and indignity.

13. Tamara Thompson and the other members of Disabled Rights residing in Las Vegas are injured (on an ongoing basis) by FSELLC's continuing to permit persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience. Plaintiffs believe that Defendant's ongoing failure to exercise its authority to require accessibility at the Fremont Street Experience will cause Plaintiffs to continue to encounter discrimination at temporary and mobile retail sales facilities at the Fremont Street Experience. Plaintiffs are subjected to such discrimination (and the injuries concomitant to discrimination, such as - but not limited to - humiliation, anger, affront and indignity) on an ongoing

basis (even without actually patronizing the Fremont Street Experience), as their entertainment choices and opportunities are unfairly limited when facilities are not readily accessible.

FIRST CAUSE OF ACTION

(Violation of Title III of the ADA -- Administrative Method Having Discriminatory Effect)

14. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 13 hereof, and incorporate the same herein by reference.

15. Among the "general prohibitions" of Title III of the ADA are "administrative methods" which "have the effect of discriminating on the basis of disability"or "that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12182(b)(1)(D).

16. Defendant's administrative methods do not prevent the discriminatory effect of persons locating inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience.

SECOND CAUSE OF ACTION

(Violation of Title III of the ADA -- Failure to Modify a Policy, Practice, or Procedure)

17. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 16 hereof, and incorporate the same herein by reference.

18. Title III of the ADA prohibits "a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges,

advantages, or accommodations to individuals with disabilities . . . ." 42 U.S.C. § 12182(b)(2)(A)(ii). Defendant has a policy, practice or procedure of permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience.

19. Prior to December 5, 2002, Defendant was requested to end its policy, practice, or procedure of permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience.

20. Plaintiff Tamara Thompson and Plaintiff Disabled Rights' members (who are injured by Defendant's policy, practice, or procedure of permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience) are wheelchair users, and provision of facilities that provide ready access to wheelchair users is therefore necessary for them.

21. The ready access that is sought by Plaintiffs would not require any facility to exceed the standards established under the applicable legislative regulations of the United States Department of Justice (see 28 CFR Part 36).

THIRD CAUSE OF ACTION

(Violation of Title III of the ADA -- "Pattern or Practice")

22. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 21 hereof, and incorporate the same herein by reference.

23. Defendant's permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience is constant and repetitive, and constitutes an ongoing "pattern or practice" of discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendant:

(a) For a permanent injunction enjoining Defendant, its agents, employees and assigns from discrimination on the basis of disability in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, et seq., and specifically requiring Defendant to (1) cease its administrative methods; (2) modify its policies, practices and procedures; and/or (3) cease its pattern or practice of discrimination which method, policies, practices, procedures, or pattern have the effect of permitting persons to locate inaccessible temporary or mobile retail sales facilities onto the Fremont Street Experience;

(b) For an order directing the disgorgement (payable to such person or persons deemed appropriate by the Court) of Defendant's wrongful gains related to it's ongoing violation of Title III of the ADA;

(c) For Plaintiffs' litigation expenses, including attorney's fees, and costs of suit; and

(d) For such other and further relief (both under law and under the Court's broad equitable jurisdiction) deemed appropriate by the Court.

RESPECTFULLY SUBMITTED this 12th day of December, 2002.

ARMKNECHT & COWDELL, P.C.
By: /s/
Richard F. Armknecht, III, Esq.
(Nevada Bar No. 5205)

Attorneys for Plaintiffs